

Foreign Fighters and the 'Evil of Statelessness'¹

Advising Caution in UK Citizenship Legislation

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I. Introduction

The deteriorating situation in Syria gives rise to a number of pressing security concerns both in the wider region and elsewhere. The phenomenon of European foreign fighters, predominantly Western nationals travelling to Syria to join the conflict, brings forth complex issues concerning domestic radicalisation and national security. The gravity and scope of the problem was made abundantly clear by the recent video release of three young Britons posing before the flag of ISIS, pledging their allegiance to the jihad and encouraging others to join them.²

As part of the response to the problem of foreign fighters, the UK Government is currently seeking a legislative change that would extend the powers of the Home Office to deprive individuals of their British citizenship, even if it means rendering them stateless. While the problem of foreign fighters certainly carries significant security implications for the UK, serious questions need to

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Quote from Lord Wilson, *Secretary of State for the Home Department v. Al-Jedda*, UK Supreme Court, 9 October 2013, §12

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'Jihadi recruitment video for Islamist terror group Isis features three Britons', *The Guardian*, 21 June 2014, <http://www.theguardian.com/world/2014/jun/20/jihadi-recruitment-video-islamist-terror-group-isis-features-britons>

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be raised regarding both the legality and legitimacy of using citizenship as a counter-terrorism tool.

The proposed change concerns Section 40 of the 1981 Nationality Act and was first introduced in December 2013. If a naturalised³ individual has 'conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom' it gives the Home Secretary the power to revoke the person's British citizenship, 'even if to do so would have the effect of making a person stateless'.

Initially voted against in the House of Lords in January, the amendment passed both Houses in May. While the new draft contains certain judicial limitations of the extended powers, it has essentially retained the purpose, namely to remove the previous limitation in the Nationality Act whereby the Home Secretary could not deprive a person of their citizenship if it would result in statelessness.⁴ As such, the now infamous clause has been heavily criticised by both members of Parliament and human rights organisations.⁵

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A person who has obtained their citizenship as an adult

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'House of Lords votes in favour of government plans to make terror suspect stateless', *Bureau of Investigative Journalism*, 13 May 2014

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For a detailed account, see *The Bureau of Investigative Journalism*, *Citizenship Revoked*, available at <http://www.thebureauinvestigates.com/category/projects/deprivation-citizenship/>

The wording of the amendment falls within the definition of the 1961 Convention of Reduction in Statelessness to which the UK is a party and one of the principal arguments of the government is based on the reservation made by UK upon accession to that treaty, whereby the right to render a person stateless on the stated grounds were retained. Accordingly, the change would only serve to return Britain to the position it had before a 2003 change in the Act; the government thus holds that the change does not breach the international obligations of the UK.⁶

Even if this argument is accepted however, the amendment carries more far-reaching legal and strategic implications than the government seem willing to admit. Not only is it in many ways contrary to the very foundation of the contemporary human rights regime; doubts can also be raised regarding its effectiveness as a counter-terrorism policy. Finally, the international standing and wider security goals of the UK may be adversely affected by a legislation that in effect shifts the burden to others and neglect the complex and transnational nature of the problem at hand.

II. Citizenship: a Privilege or a Right?

As a justification for the proposed change, the Home Office have argued that it will only affect a

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Home Secretary Theresa May, Debate in House of Commons, 30 January 2014, <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>

very small number of individuals and further that the individuals deprived of their citizenship always have the option to gain a different nationality elsewhere.⁷ Of greater concern from a human rights perspective is however the principal statement such legislation endorses, namely that it is acceptable to make individuals stateless in pursuit of national security. Contrary to what Immigration Minister Harper has suggested, that 'citizenship is a privilege, not a right',⁸ several prominent authorities, including the UN Human Rights Council, has emphasised the fundamental nature of the right to nationality as part of the international human rights regime.⁹ Enshrined in the Universal Declaration of Human Rights and subsequent treaties to which the UK has committed itself, the right to nationality is thus one of the cornerstones of the contemporary system of individual human rights. A more accurate description is therefore that citizenship is a privilege *and* a right.

In the Government's own assessment of the human rights implications of the proposed

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Home Secretary Theresa May, Debate in House of Commons, 30 January 2014, <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>

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'Home Secretary pushes through 'controversial' powers to make people stateless, The Bureau of Investigative Journalism, 30 January 2014, <http://www.thebureauinvestigates.com/2014/01/30/home-secretary-pushes-through-controversial-powers-to-make-people-stateless/>

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UN Secretary-General Report 'Human rights and arbitrary deprivation of nationality', A/HRC/25/28, 19 December 2013

change, the lack of a specific provision within the European Convention on Human Rights is given as evidence that the legislation would not be in breach of Britain's human rights obligations. The Report highlights that other rights under the Convention, notably the right to personal life, may be engaged since nationality is part of a person's identity.¹⁰ The Government's understanding of the right to nationality is thus narrowly construed as being strictly personal, ignoring its highly significant civil elements.

The additional argument that individuals do not have the right to a *particular* nationality is simply an unsustainable position to hold since the right to nationality, as well as the human rights regime in general, is built on the premise of obligations *erga omnes*: it is a concern for all, and thus all are responsible. While the legislation is designed to comply with the 1961 Convention, the reasoning that accompany it marginalises the wider object and purpose of the Convention, namely the progressive reduction of statelessness.¹¹

In an oft-cited judgement of the United States Supreme Court in 1958, rendering people stateless was described as 'the total destruction

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'Supplementary Memorandum by the Home Office', 29 January 2014, §§10-12, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf

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Open Society Justice Initiative, 'Opinion on Clause 60', 5 March 2014, <http://www.opensocietyfoundations.org/sites/default/files/briefing-clause60-03112014.pdf>

of the individual's status in organized society' and as 'a form of punishment more primitive than torture.'¹² As emphasised by members of the House of Lords, it is a policy pursued by the worst regimes of the 20th century, a policy that seek not only to deprive a person of their identity but also of their status: of their fundamental right to have rights.¹³ In light of this, such far-reaching infringements cannot simply be ignored on the basis of a legalistic reading of international obligations. Not only will it set a harmful precedent to others but the reputation and international standing of the UK may, and quite rightly should, suffer as a result.

III. Statelessness as a Policy Tool: Law and Practice

The legal difficulties with removal of citizenship are both domestic and international. On a domestic level, depriving a person of their citizenship would have only a marginal effect as, firstly, the person would continue to enjoy the rights under the two Statelessness Conventions and, arguably, the ECHR.¹⁴ The Home Affairs

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Chief Justice Warren, *Trop v Dulles*, 31 March 1958, http://www.law.cornell.edu/supremecourt/text/356/86#writing-USSC_CR_0356_0086_ZO

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'UK House of Lords defeats Government on deprivation of citizenship leading to statelessness', European Network on Statelessness, 29 April 2014, <http://www.statelessness.eu/blog/uk-house-lords-defeats-government-deprivation-citizenship-leading-statelessness>

¹⁴

Goodwin-Gill, 'Deprivations of Citizenship resulting in Statelessness and its Implications in International Law', 12 March 2014, §26

Committee of the House of Commons, for example, has stated that ‘the legislation would seem to have no discernible outcome were it used against someone whilst they were in the UK’.

The recommendation of the Committee, that the Government should ‘use the power only when the person subject to the decision is outside the UK’ is however equally, if not more, problematic.¹⁵ According to Professor of International Refugee Law Guy S. Goodwin-Gill, any state which has admitted the person on the basis of their British citizenship has a right under international law to return the person; should the UK refuse re-admission, it will be in breach of its obligations towards that state.¹⁶ In addition, establishing jurisdiction over terrorist crimes is an international obligation of the UK under several multilateral treaties, further highlighting the extensive juridical difficulties with the current proposal.¹⁷ Aside from the associated legal and practical problem, the proposed legislation also sends unfortunate signals to the international community regarding the (un)willingness of Britain to act responsibly and further that Britain is prepared to shift the burden of the threat of

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17th Report on Counter-Terrorism, 30 April 2014, §99 and §101

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Goodwin-Gill, §24

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Goodwin-Gill, §30; relevant treaties include the 1979 International Convention against the Taking of Hostages, the 1997 International Convention for the Suppression of Terrorist Bombings, and the 2000 International Convention for the Suppression of the Financing of Terrorism

which the person is presumably suspected to others, irrespective of its legal obligations.

Not only would use of the legislation against British nationals abroad be potentially contrary to Britain’s obligations towards other States and the international community, but it could also serve to undermine the wider security strategy of the UK. The recently launched Building Security Overseas Strategy in particular emphasise the need to assist weak States as a means to maintain security at home.¹⁸ Yet the new powers would make it possible for the Home Secretary to, in effect, dump potentially destabilising individuals on States that has much less capacity for effective prosecution, not to mention de-radicalisation and re-integration.

Furthermore, as for example Dr Thomas Hegghammer of the Norwegian Defence Research Establishment has held, making person’s in conflict stateless may only have the effect of closing the door on the alternative and thus encourage further isolation and fighting.¹⁹ A similar concern has been advanced by the European Commission’s Radicalisation Awareness Network, warning that ‘heavy-handed legal measures, such as the threat of revoking a

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Available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32960/bsos-july-11.pdf

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‘Foreign Fighters in Syria: A Danger to the West?’, 26 November 2013,
<http://henryjacksonsociety.org/2013/11/26/foreign-fighters-in-syria-a-danger-to-the-west/>

passport, may deter foreign fighters from engagement and prompt them to travel to another conflict or region.’²⁰

Hence, rather than using the juridical framework that exist to prosecute suspected terrorists upon their return, a deprivation of citizenship may only result in the threat materialising elsewhere, potentially contributing further to already precarious security situations and increasing, rather than decreasing, the present threat. It is difficult to reconcile a strategy that acknowledge the importance of internal stability in weak States and identify terrorism as one of the prime sources of instability with a policy that seek to off-load individuals suspect of precisely those things on States with much less capacity to deal with them.

IV. The Options

The fundamental problem of how to effectively protect the State and its citizens against the varied and unconventional threat posed by terrorism now includes the phenomenon of foreign fighters, returning from conflict zones with both enhanced capabilities and ideological convictions. With the security situation in Syria and Iraq rapidly deteriorating, it is unlikely that the problems of foreign fighters will abate any time soon. The complexity of the problem should not be underestimated or the responses to it too

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RAN Declaration of Good Practices, p 2,
<http://www.icct.nl/download/file/RAN-Declaration-Good-Practices-for-Engagement-with-Foreign-Fighters.pdf>

easily criticised, as some will necessarily have to be built on experience. Yet these responses, by the UK as well as other Western governments, must hold up to scrutiny both in relation to their human rights implications and in relation to the problem at hand. With regards to the deprivation of citizenship, the implications are highly questionable.

Several authorities, including the House of Commons Home Affairs Committee, emphasise the need to build broad-based responses to domestic radicalisation, focusing on both preventative and punitive aspects. This includes efforts at prevention of travel and intelligence along with a more long-term strategy aimed at sources of domestic radicalisation. In addition, the current legal framework needs to be utilised more effectively against returning foreign fighters by effective prosecution of returnees suspected of committing criminal offences while away.

Developing mechanisms for de-radicalisation and treatment for those suffering mental health issues upon return, preferably linked to potential convictions, has been highlighted as another important tool.²¹ These are most certainly time-consuming and expensive efforts and therefore unlikely to be a source of popularity for either this or future governments. However, to counter the growing problem of foreign fighters and

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See for example: RAN Declaration of Good Practice; House of Commons Home Affairs Committee 17th Report on Counter-Terrorism

minimise the threat posed upon return, a targeted and multifaceted response in cooperation with others is clearly a necessary element.

The recent case of Nahin Ahmed and Yusuf Sarwar is a clear example of how the issue of returning foreign fighters can be handled within the legal framework already in place. Having been given warning from relatives, the two Britons were detained upon return from Syria and subsequently prosecuted; on 8 July, they both pleaded guilty to terrorism charges.²² The case not only reflects the importance of establishing and exercising jurisdiction over the individuals concerned, where citizenship is an important element, but also centrally the significance of allowing return. It also serves to illustrate the multifaceted nature of the necessary responses. Outreach to relatives and the wider society, along with effective intelligence, law enforcement and prosecution demands different strategies but it remains within the framework of rule of law and human rights of a responsible international power. Depriving individuals of their citizenship and shifting the burden to fragile States does not.

V. Summary

Short-term legislation cannot serve as a substitute for long-term engagement any more than a strict domestic perspective can offer

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‘British pair who travelled to Syria admit terror charges’, BBC, 8 July 2014, <http://www.bbc.co.uk/news/uk-28212679>

effective and durable solutions to a transnational problem. Not only may this legislation miss the target; the UK may end up shooting itself in the foot in the process.

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